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Otto Trucking LLC

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

19 | WAYMO LLC,

Plaintiff,

V.

22 Uber Technologies, Inc.; Ottomotto LLC; Otto
23 Trucking LLC.

Defendants

Case No. 3:17-cv-00939-WHA

**OTTO TRUCKING LLC'S MOTION FOR
RELIEF FROM NONDISPOSITIVE
PRETRIAL ORDER RE: WAYMO'S
MOTION TO COMPEL OF MAGISTRATE
JUDGE (DKT. 881)**

**REDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED**

Courtroom: 8, 19th Floor
Judge: Honorable William Alsup
Trial Date: October 10, 2017

Filed/Lodged Concurrently with:
1. [Proposed] Order Granting Motion for Relief
from Nondispositive Pretrial Order of
Magistrate Judge

1 Otto Trucking LLC (“Otto Trucking”) objects and moves to vacate Judge Corley’s July 12,
 2 2017 Order re: Waymo’s Motion to Compel (Dkt. 881) to the extent that it granted Waymo’s
 3 request to compel Otto Trucking to produce documents outside its possession, custody, or control.
 4 *Id.* at 4 ln.15-27. Incorrectly stating that Otto Trucking had cited no cases to support its position,
 5 Judge Corley ordered Otto Trucking to search the personal emails of its officers to find documents
 6 responsive to Plaintiffs requests. The law is clear that a company does not have control over the
 7 personal emails of non-parties absent a contract permitting access to those emails. *See Matthew*
 8 *Enterprise, Inc. v. Chrysler Group LLC*, No. 13-CV-04236-BLF, 2015 WL 8482256, at *4 (N.D.
 9 Cal. Dec. 10, 2015) (Grewal, J.). No such contract exists here, and thus, Otto Trucking should not
 10 be compelled to collect and search the personal emails of its non-party officers. Instead, Waymo
 11 can seek those documents (as it already has in some instances) directly from the individuals.

12 **I. OTTO TRUCKING IS NOT OBLIGATED TO PRODUCE EMAILS FROM
 13 PERSONAL EMAIL MAILBOXES OF OTTO TRUCKING MEMBERS.**

14 As the Court is aware, Otto Trucking is a limited liability company that is separate from
 15 Uber and Ottomotto. It is a holding company with a subsidiary named Otto Transport [REDACTED]
 16 [REDACTED]. Dkt. 843-8, Otto Trucking Response to
 17 Interrogatory No. 24. It does not develop or conduct any work relating to self-driving vehicles,
 18 and [REDACTED]
 19 [REDACTED]. *Id.* Otto Trucking has four officers:
 20 Anthony Levandowski, Managing Member and Executive Chairman; Lior Ron, Managing
 21 Member, Chief Executive Officer, and General Manager; Adam Bentley, General Counsel; and
 22 Rhian Morgan, Secretary. *See* Dkt. 747, Ex. 1, Declaration of Lior Ron; Dkt. 804-2 (Otto
 23 Trucking LLC Agreement). Otto Trucking has no employees or consultants or operations, and
 24 does not have networks, servers, or email systems. *See* Dkt. 747, Ex.1. Because Otto Trucking
 25 has no operations, few emails or documents have been generated as part of its business. To date,
 26 Otto Trucking has produced the entirety of its data room from [REDACTED]
 27 [REDACTED] and the documents in
 28 its possession, custody, or control that are responsive to Waymo’s requests. Otto Trucking has

1 resolved nearly all issues raised by Waymo and has even produced responsive documents from its
 2 wholly owned subsidiary, Otto Transport.

3 Here, Waymo incorrectly believes Otto Trucking can search the personal emails of its
 4 officers. These are not emails on an Otto Trucking email address, an Otto Trucking email
 5 account, or any Otto Trucking server (because Otto Trucking has no servers). This motion to
 6 compel was made despite the fact that Waymo could subpoena, and indeed has subpoenaed, the
 7 production of documents relevant to this case from the non-party officers directly. Otto Trucking
 8 cited to two highly relevant cases in this District that have held that a company does not have
 9 control over personal email absent a contract providing a legal right to access those personal email
 10 accounts. *See Matthew Enterprise*, 2015 WL 8482256, at *4; *Ubiquiti Networks, Inc. v. Kozumi*
 11 *USA Corp.*, No. 12-cv-2582 CW JSC, 2013 WL 1767960, at *1-2 (N.D. Cal. Apr. 15, 2013).
 12 Claiming that Otto Trucking had cited “inapposite cases,” Judge Corley granted the motion and
 13 ordered Otto Trucking to explore the private emails of several members. Judge Corley’s ruling
 14 was error.

15 **II. JUDGE CORLEY INCORRECTLY ORDERED OTTO TRUCKING TO
 16 PRODUCE DOCUMENTS FROM THE PERSONAL EMAILS OF ITS OFFICERS**

17 Judge Corley ordered Otto Trucking to produce documents from the personal emails of
 18 Lior Ron, Adam Bentley, and Rhian Morgan because (i) they conducted company business from
 19 their personal email; (ii) they are currently involved in the company; and (iii) Otto Trucking cited
 20 to inapposite cases because the cases concerned the emails of employees and consultants, and not
 21 officers. *See* Dkt. 881 at 3. Judge Corley was wrong to describe the cases cited as “inapposite.”

22 The cases cited by Otto Trucking make clear that, absent a contractual obligation, a
 23 corporate entity cannot force production of personal emails. In *Matthew Enterprises*, the question
 24 before the court was whether plaintiff was required to produce business-related documents and
 25 emails that were only located in the personal emails of its current employees. *See id.* at 2015 WL
 26 8482256 at *3. Plaintiff did not furnish all of its employees with email accounts, and as such,
 27 many of the employees used their personal accounts for business purposes. *Id.* Despite company
 28 business being clearly contained in the personal emails of the employees, the court held that

1 plaintiff did not have control over its employees personal emails such that the company could be
 2 compelled to produce documents from those emails. *Id.* at *4. Although a company policy
 3 required that “internal information” be kept in the sole possession of plaintiff and the employee
 4 handbook required employees to return company information upon request, because the policy
 5 was not a contract and the employee handbooks were not signed by employees, there was no
 6 contract that would “create a legal right for [plaintiff] to take back any such information stored in
 7 personal accounts.” *Id.* (citing to *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999)).

8 *Ubiquiti Networks* similarly held that a company cannot be compelled to produce
 9 responsive documents found in the personal email of one of its current consultants. *Id.* at 2013
 10 WL 1767960 at *2-3. Though the consultant used both his company email and personal email to
 11 conduct company business, “Plaintiff has not cited any authority for the proposition that it can
 12 order Defendants’ to obtain access to [the consultant’s] personal gmail account.” *Id.*

13 These cases are directly on point. Like plaintiff in *Matthew Enterprises*, although Otto
 14 Trucking has permitted its current managing members and officers to conduct the limited Otto
 15 Trucking business using their personal email, there is no contract that requires these non-parties to
 16 provide Otto Trucking with access to their personal emails. The fact that there may be some
 17 responsive documents in these personal emails is not dispositive as the question at hand is about
 18 control, not relevance. Indeed, both *Matthew Enterprises* and *Ubiquiti Networks* concerned
 19 personal emails that contained company documents and yet the courts still found that the
 20 companies could not be compelled to produce documents from the nonparties’ personal emails.

21 The only distinction between Otto Trucking and the cases it cited, as noted by Judge
 22 Corley’s order, is that the cases dealt with employees and not officers. But there is no legal basis
 23 to make a distinction between officers and employees in this context. In *Matthew Enterprises*, the
 24 Court considered an out of district case that implied that a company had control over the personal
 25 email accounts of its officers, and rejected it because the court’s implied finding of control did not
 26 accord with the law of the Ninth Circuit. *Id.* at *4 n.44 (distinguishing *P.R. Tel. Co., Inc. v. San*
 27 *Joan Cable, LLC*, Case No. 11-cv-2135, 2013 WL 5533711, at *1 (D.P.R. Oct. 7, 2013)). Waymo
 28 cited to no case that supports the proposition that employees and officers should be treated

1 differently with respect to control over personal email.

2 In addition, in *Miniaci v. Pacific Maritime, Ass'n*, No. C 04-03506 SI, 2006 WL 335389,
 3 at *2 (N.D. Cal. Feb. 13, 2006), the only case from this district cited by Waymo for this issue, the
 4 court required a corporation to obtain documents from its non-party directors because the
 5 corporation had the ability to remove a director from its board, thus demonstrating a termination
 6 power similar to that over an employee. *See id.* at *2. No similar termination power exists here.
 7 If anything, under *Miniaci*, Otto Trucking has less control over its officers than the *Miniaci*
 8 corporation had over its directors and employees. *See id.* (“The determination [of control] is fact
 9 specific. Central to each case is the relationship between the party and the person or entity having
 10 actual possession of the document.”). As a limited liability company, Otto Trucking does not have
 11 a board of directors and [REDACTED]
 12 [REDACTED]. *See Dkt. 804-2 (Otto Trucking LLC*
 13 *Limited Liability Company Agreement)*. Furthermore, [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED] The individuals whose emails are sought exercise control over Otto Trucking—not the
 19 other way around.¹

20 By ruling in Waymo’s favor, Judge Corley ignored the cases from this district that are
 21

22 ¹ Plaintiffs other cases are from outside this jurisdiction and should be disregarded. In addition,
 23 they are distinguishable. *Riddell Sports Inc. v. Brooks*, 158 F.R.D. 555 (S.D.N.Y 1994) concerns
 24 discreet tapes, which are distinct from requiring a non-party to hand over their entire personal
 25 email for searching, and like *Miniaci*, [REDACTED]. *In re*
 26 *Folding Carton Antitrust Litigation*, 76 F.R.D. 420 (1997) acknowledges that while a corporation
 27 can request the cooperation of former employees who are still receiving some economic benefit
 28 from the corporation, those former employees may still chose to decline. *See id.* at 423. In the
 Ninth Circuit, the ability of non-party to not cooperate with a company’s request is clear evidence
 of the absence of control. *See In re Citric Acid*, 191 F.3d at 1108 (“Ordering a party to produce
 documents that it does not have the legal right to obtain will oftentimes be futile, precisely because
 the party has no certain way of getting those documents.”); *Matthew Enterprises*, 2015 WL
 8482256 at *4; *Ubiquiti*, 2013 WL 1767960 at *2.

1 directly on point and shifted Waymo's burden of showing that Otto Trucking has control over
 2 these personal emails to Otto Trucking to show that it does not have control. *See e.g. U.S. v. Int'l*
 3 *Union of Petroleum & Indus. Workers*, 870 F.2d, 1450, 1452 (9th Cir. 1989) (The party seeking
 4 production of the documents bears the burden of proving that the opposing party has such control).

5 The Court should follow *Matthew Enterprises* and *Ubiquiti* and determine that Otto
 6 Trucking does not have control over the personal emails of Lior Ron, Adam Bentley, and Rhian
 7 Morgan such that it can be compelled to produce documents from those accounts.

8 **III. WAYMO CAN OBTAIN THE REQUESTED DOCUMENTS FROM THE
 9 NONPARTIES UNDER RULE 45**

10 Contrary to Judge Corley's concern, Otto Trucking is not seeking to hide responsive
 11 documents. Otto Trucking contends that the proper mechanism for obtaining documents from
 12 non-parties is via the subpoena power—which Waymo already has exercised in this case to
 13 request the same documents it seeks from Otto Trucking. Recognizing the third party status of
 14 Otto Trucking's officers, Waymo has already subpoenaed emails from Lior Ron, and counsel for
 15 Mr. Ron has responded to that subpoena. Waymo can similarly subpoena emails and documents
 16 from the personal emails of Adam Bentley and Rhian Morgan. Where documents are in the
 17 possession of a non-party, the court should direct the requesting party to seek the documents from
 18 that non-party instead of a party to the action. *See Fed R. Civ. Proc. 34(c); 45; Flores v. DDJ,*
 19 *Inc.*, No. CV-F-99-5878AWIDLB, 2008 WL 598166, at *2 (E.D. Cal. Mar. 4, 2008) (denying
 20 motion to compel production of documents from defendants' officers under Rule 34, as the
 21 "proper device for obtaining discovery from non-parties is a Rule 45 subpoena"); *E.W. v. Moody*,
 22 No. C06-5253 FDB, 2007 WL 445962, at *4 (W.D. Wash. Feb. 7, 2007) (directing Plaintiff to use
 23 Rule 45 to obtain non-privileged documents directly from defendant's non-party attorneys).
 24 Waymo chose to sue Otto Trucking and it cannot be allowed to use party discovery to obtain
 25 documents in the possession of non-party officers.

26 **IV. CONCLUSION**

27 For the foregoing reasons, Otto Trucking asks that the Court grant this motion and sustain
 28 Otto Trucking's objection to Judge Corley's order.

1 Dated: July 17, 2017

Respectfully submitted,

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